

Letter of Findings Number: 04-20110110
Use Tax
For Tax Years 2007-09

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Use Tax—Imposition.

Authority: Frame Station, Inc. v. Indiana Dep't of State Rev., 771 N.E.2d 129 (Ind. Tax Ct. 2002); IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-1-5; IC § 6-2.5-4-1; IC § 6-8.1-5-1; [45 IAC 2.2-3-4](#).

Taxpayer protests the imposition of use tax on certain purchases.

STATEMENT OF FACTS

Taxpayer is an Indiana electrical service provider. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not paid sales tax on certain purchases at the time of purchase. The Department therefore issued proposed assessments for use tax and interest for the tax years 2007, 2008, and 2009. Taxpayer disagrees with one category of purchases included as taxable purchases and also disagrees with the Department's audit method regarding a sample and projection method used in the audit. Taxpayer therefore protests a portion of the use tax assessments. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Use Tax—Imposition.

DISCUSSION

Taxpayer protests the imposition of use tax on postage charges associated with its purchases of tangible personal property and mailing services from two billing service providers ("Vendors"). The Department included postage charges in its calculation of charges subject to use tax. Taxpayer argues that these charges are not subject to use tax. Taxpayer also protests the Department's sample and projection method, arguing that it was not accurate enough and proposing an alternative projection method. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

The sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

The use tax is imposed under IC § 6-2.5-3-2(a), which states:

- (a) An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Also, [45 IAC 2.2-3-4](#) provides:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, when tangible personal property is acquired in a retail transaction and is stored, used, or consumed in Indiana, Indiana use tax is due if sales tax has not been paid at the point of purchase. The Department determined that Taxpayer had not paid sales tax on some taxable purchases and so imposed Indiana use tax on those purchases.

Taxpayer's first point of protest is in regards to postage charges by Vendors who printed and mailed Taxpayer's monthly bills to Taxpayer's customers. The Department considered the postage to be subject to sales and use tax and referred to IC § 6-2.5-1-5(a), which provides:

Except as provided in subsection (b), "gross retail income" means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property is sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for:

- (1) the seller's cost of the property sold;
- (2) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;
- (3) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;
- (4) delivery charges; or

(5) consideration received by the seller from a third party if:

- (A) the seller actually receives consideration from a party other than the purchaser and the consideration is directly related to a price reduction or discount on the sale;
- (B) the seller has an obligation to pass the price reduction or discount through to the purchaser;
- (C) the amount of the consideration attributable to the sale is fixed and determinable by the seller at the time of the sale of the item to the purchaser; and
- (D) the price reduction or discount is identified as a third party price reduction or discount on the invoice received by the purchaser or on a coupon, certificate, or other documentation presented by the purchaser. For purposes of subdivision (4), delivery charges are charges by the seller for preparation and delivery of the property to a location designated by the purchaser of property, including but not limited to transportation, shipping, postage, handling, crating, and packing.
(Emphasis added).

Taxpayer argues that the postage charges are not subject to use tax and refers to IC § 6-2.5-4-1(e), which provides:

The gross retail income received from selling at retail is only taxable under this article to the extent that the income represents:

- (1) the price of the property transferred, without the rendition of any service; and
- (2) except as provided in subsection (g), any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records. For purposes of this subsection, a transfer is considered to have occurred after delivery of the property to the purchaser.

(Emphasis added).

Taxpayer argues that the bills are not transferred until they are actually delivered to its customers. In Taxpayer's view, the bills are transferred at the moment the postal service picks the bills up. Since some bills could be undeliverable and since Taxpayer is listed as the return address, Taxpayer could receive the bills back from the postal service. Also, Taxpayer does not pay the vendors until it receives the invoice for the billing services from Vendors, which happens after Taxpayer's customers' bills are placed into the mail system. Taxpayer therefore believes that the postal services in question occur after the transfer and are therefore not taxable under IC § 6-2.5-4-1(e).

Taxpayer believes that the Department improperly relied on the Indiana Tax Court case *Frame Station, Inc. v. Indiana Dep't of State Rev.*, 771 N.E.2d 129 (Ind. Tax Ct. 2002), in which the Indiana Tax Court discussed the taxable status of services provided before or after the transfer of tangible personal property. In that case, the court stated:

The transfer of property occurs when the buyer (1) agrees to buy property from a seller, (2) pays the purchase price, and (3) takes ownership and possession of the property. In this case, the evidence shows that customers pay the total price for their framed art when they pick it up after all framing services have been performed. Therefore, Framemakers' services are performed prior to the transfer of property and constitute taxable retail unitary transactions under Indiana Code Section 6-2.5-4-1(e).

Id. at 131.

(Internal notations omitted).

Taxpayer believes that the court's definition of a "sale" is overly simplistic and refers to two other definitions of "sale." Both definitions reinforce Taxpayer's argument that title to the bills transfers at the time the bills are placed into the mail system.

The Department agrees that title passes to Taxpayer when Vendors place the bills into the mail system. However, this means that Vendors have incurred the cost of mailing the bills via the postal service prior to transfer and are charging Taxpayer for the postage as part of Vendors' services. This falls squarely within the definition of "delivery services" to be included in "gross retail income" as provided by IC § 6-2.5-1-5(a)(5)(D). The fact that Taxpayer is listed as the return addressee does not change the fact that delivery charges are included in the selling price set by Vendors and are incurred by Vendors prior to transfer to Taxpayer. Taxpayer has not met the burden of proving the inclusion of postal charges wrong, as required by IC § 6-8.1-5-1(c).

Taxpayer's second point of protest is in regards to the sample and projection methodology used by the Department to determine Taxpayer's use tax compliance percentages for the years at issue. The Department took a sample of Taxpayer's purchases for one of the years (2009), determined the percentage of compliance and then applied that percentage to all three years.

Taxpayer protests that the Department's method was not as reliable as it should have been and offers an alternate method. That method results in a lower amount of use tax due for the three year period. Taxpayer believes that it is a more accurate method and is therefore a more accurate use tax result. Documentation and analysis was provided in support of Taxpayer's position.

After review, the Department is not convinced that its projection numbers are wrong. For instance, one of the factors Taxpayer included in its calculations was the removal of the postage issue above. However, the postage is

properly subject to use tax as described above and should not be removed. Therefore, while Taxpayer's method certainly results in different numbers, such numbers do not prove that the Department's numbers are wrong, as required by IC § 6-8.1-5-1(c). Taxpayer has not met the burden of proving the proposed assessments wrong.

FINDING

Taxpayer's protest is denied.

Posted: 10/26/2011 by Legislative Services Agency
An [html](#) version of this document.